

Aug 1, 2017

Submitted via electronic form on FOIA online web site  
<https://foiaonline.regulations.gov>

Vicki Ferguson  
Region 8, Mailcode: 8-OC  
U.S. Environmental Protection Agency  
1595 Wynkoop Street  
Denver, Colorado 80202-1129

**Re:** Freedom of Information Act Request seeking information related to EPA Region 8's communications with the State of Montana concerning numeric nutrient water quality standards and variances for public and private entities

Dear Ms. Ferguson:

Upper Missouri Waterkeeper, Inc. (UMW) hereby requests records, as described below, pursuant to the Freedom of Information Act (FOIA). 5 U.S.C. § 552 *et seq.* UMW requests disclosure of all requested records including any and all nonexempt portions of records that are otherwise determined to be exempt from review under the FOIA. 5 U.S.C. §552(b). The timeframe of this request is February 26, 2015 to present. We request any and all records that refer or relate to the following :

1. Discussion and communication between EPA Region 8 (R8) and the Montana Department of Environmental Quality (DEQ) concerning review and/or revision of Montana's numeric nutrient criteria for nitrogen and phosphorus;
2. Discussion and communication between R8 and DEQ concerning review and/or revision of Montana's water quality standards for nitrogen and phosphorus;
3. Discussion and communication between R8 and DEQ concerning review and/or revision of Circular 12-A;
4. Discussion and communication between R8 and DEQ concerning review and/or revision of Montana's nutrient variance rule;
5. Discussion and communication between R8 and DEQ concerning review and/or revision of Circular 12-B;
6. Research or data compiled as part of any of the review and/or revision in the first five requests set forth above;
7. Discussion and communication between R8 and DEQ concerning review and/or revision of *Upper Missouri Waterkeeper v. EPA*, No. 4:16-cv-00052-BMM

This request is not meant to be exclusive of any other records that, although not specifically requested, have a reasonable relationship to the subject matter of this request. If you, or your office, have destroyed or decide to withhold any documents that could be reasonably construed to be responsive to this request, we ask that you indicate this fact and the reasons therefore in your response.

UMW looks forward to a response and determination from your office within twenty working days of receipt of this request consistent with 5 U.S.C. § 552(a)(6) of the FOIA, and 40 C.F.R. § 2.104 of EPA's regulations. If this request is denied in whole or in part, we request a detailed description of, at a minimum: (1) a detailed index/list of the records withheld, including the name of the record, the subject of the record, the author of the record, and the date of the record; as well as (2) EPA's basis for withholding the records. *Church of Scientology Intern. v. U.S. Dept. of Justice*, 30 F.3d 224, 227 (1<sup>st</sup> Cir. 1994); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied* 415 U.S. 977 (1974).

## EXEMPT RECORDS

Should you decide to invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for UMW to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder to UMW as required by 5 U.S.C. § 552(b).

Finally, even if you ultimately conclude that the requested records are exempt from mandatory disclosure under FOIA, we request that you disclose them nevertheless, pursuant to the Agency's powers of discretionary release under the FOIA. Such disclosure would serve the public interest of educating citizens regarding the operations and activities of R8 and the MT DEQ regarding the water quality programs that are the subject of this request. This issue was directly addressed in the Guidance provided by the Department of Justice's Office of Information Policy ("OIP"): President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines *Creating a "New Era of Open Government"* (available for download at <http://www.usdoj.gov/oip/-foiapost/2009foiapost8.htm> (last visited October 1, 2013)). The OIP noted the initiatives embodied both by the Presidential and Attorney General's mandates and instructed that:

The key frame of reference for this new mind set is the purpose behind the FOIA. The statute is designed to open agency activity to the light of day. As the Supreme Court has declared: "FOIA is often explained as a means for citizens to know what 'their Government is up to.'" *NARA v. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The Court elaborated that "[t]his phrase should not be dismissed as a convenient formalism." *Id.* at 171-72. Rather, "[i]t defines a structural necessity in a real democracy." *Id.* at 172. The President's FOIA Memoranda directly links transparency with accountability which, in turn, is a requirement of a democracy. The President recognized the FOIA as "the most

prominent expression of a profound national commitment to ensuring open Government.” Agency personnel, therefore, should keep the purpose of the FOIA -- ensuring an open Government -- foremost in their mind.

Second, agencies should be mindful not to review records with the sole purpose of determining what can be protected under what exemption. Instead, records should be reviewed in light of the presumption of openness with a view toward determining what can be disclosed, rather than what can be withheld. For every request, for every record reviewed, agencies should be asking “Can this be released?” rather than asking “How can this be withheld?”

Third, in keeping with the Attorney General’s directive, agencies “should not withhold information simply because [they] may do so legally.” Information should not automatically be withheld just because an exemption technically or legally might apply. Indeed, if agency personnel find themselves struggling to fit something into an exemption, they should be aware of the President’s directive that “[i]n the face of doubt, openness prevails.”

For the reasons above we anticipate that the EPA will release the requested information.

### **FEE WAIVER REQUEST**

We ask that you waive all copy, clerical and other fees associated with providing information responsive to this request. The FOIA requires agencies to furnish documents to information requesters free of charge, or at a reduced rate, “if disclosure of the information is in the public interest.” 5 U.S.C. § 552(a)(4)(A)(iii). Such disclosure is in the public interest if “it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* While a FOIA requester bears the initial burden of making a prima facie showing of entitlement to a fee waiver, *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284-85 (9<sup>th</sup> Cir.1987), once that threshold has been satisfied, the burden shifts back to the agency to substantiate denial of a waiver request. The prima facie test is not intended to be a difficult one to satisfy, as the Ninth Circuit has held a requester meets this burden in situations in which “They identified why they wanted the [requested information], what they intended to do with it, to whom they planned on distributing it. . .” *Friends of the Coast Fork v. BLM*, 110 F.3d 53, 55 (9<sup>th</sup> Cir.1997).

As you consider our fee waiver request, please recall that in enacting FOIA, Congress was “principally interested in opening administrative processes to the scrutiny of the press and public.” *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17 (1974). To further this policy, FOIA requires that documents must be provided without charge or at a reduced charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii).

UMW works to solve the environmental problems that threaten waterways, natural resources, and communities of Southwest and West-Central Montana’s Upper Missouri River Basin.

UMW advocates using law, economics, science and public education to design and implement strategies that conserve natural resources, protect public and watershed health, and promote vital communities in our region. UMW has an established advocacy center in Southwest Montana and is a leader in addressing important environmental policy affecting Montana's water quality, watersheds and communities. UMW is a non-profit, member-supported organization with no commercial interest in obtaining the requested information. Instead, UMW intends to use the requested information to inform the public, so the public can understand and meaningfully engage in the Montana DEQ's decisionmaking concerning likely consideration and granting of variance requests under the Clean Water Act.

As explained more fully below, the above-referenced FOIA request satisfies the factors listed in the EPA's governing regulations for "Waiver or Reduction of Fees" as well as the requirements of fee waiver under the FOIA statute – that "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(iii), *see also* 40 C.F.R. § 2.107(l)(1).

**1. The subject matter of the requested records must specifically concern identifiable "operations and activities of the government." 40 C.F.R. § 2.107(k)(2)(i).**

The requested records relate to EPA R8's interaction with Montana DEQ, an entity subject to regulation by the Agency. Further, responsive documents will necessarily pertain to EPA's implementation of the federal Clean Water Act and FOIA. These undertakings are unquestionably "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. There can be no question that this is such a case.

**2. The disclosure of the requested documents must have an informative value and be "likely to contribute to an understanding of Federal government operations or activities." 40 C.F.R. § 2.107(l)(2)(ii).**

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are "likely to contribute" to an understanding of EPA's decisions because they are not otherwise in the public domain and are not accessible other than through this FOIA request. As the Montana DEQ moves forward in an attempt to adopt a new nutrient rule package, including a variance provision under the Clean Water Act, it is important for information relating to government considerations and rationales involving the nutrient rule package and related variance provision to be made available to the public.

It is equally important that the nature and scope of the Agency's relationship with Montana DEQ, and rationale for any encouragement or support of Montana's proposed nutrient rule package and related variance rule, be subject to public oversight. Insofar as R8 must approve

new state water quality criteria and proposed variances, the information sought will facilitate meaningful public participation in Montana DEQ's implementation of numeric nutrient criteria and potential authorization of any variances under the Clean Water Act, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of the EPA R8's decisionmaking process with regard to Montana's draft numeric rule package and related variance rule.

**3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester — *i.e.*, expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined. 40 C.F.R. § 2.107(l)(2)(iii).**

The Environmental Protection Agency (EPA) has established national water quality standard that each state is required to meet for each of its water bodies. Further, EPA has encouraged states to adopt specific numeric criteria that better protect waterways and designated uses and assist states in implementing their delegated Clean Water Act authorities. Certain water bodies are too polluted to meet water quality standards; these waters are referred to as impaired, and become a priority for state regulation. As a result the state is required to implement a TMDL that enforces stricter control on discharges going into the water than those waters that are not impaired. Water quality standards provide the "floor" of minimum water quality a waterway must maintain; in turn, variances provide a temporary means of allowing dischargers to discharge pollutants above and beyond their permit terms and potentially violate water quality standards. Montana is presently adopting new numeric water quality standards and related variance provisions.

UMW is closely involved with Montana's planning and adoption of new numeric water quality criteria and related variances as these limits and variances will affect planning and enforcement of water quality standards in within the Upper Missouri River Basin. UMW is interested in reviewing and submitting comments and research on all aspects of proposed nutrient water quality criteria and related variances, particularly in the context of state performance of Integrated Reports pursuant to Section 303(d) of the Clean Water Act, in the issuance of National Pollutant Discharge Elimination System (NPDES) permits, and in the context of existing TMDL or impaired waterways. UMW is experienced and capable in its use of the FOIA and is well-suited to evaluate R8's and the Montana DEQ's adoption of numeric nutrient water quality standards and variances from those standards.

UMW disseminates the information it receives through FOIA regarding government operations and activities through a variety of ways, including but not limited to, analysis and distribution to the media, distribution through publication and mailing, posting on UMW's website, emailing and list serve distribution to members. Each month, UMW's website receives approximately 450 visits. In addition, UMW disseminates information obtained through FOIA through comments to administrative agencies, and where necessary, through the judicial system. UMW has published, posted, and disseminated numerous summaries and articles on state implementation of the federal Clean Water Act, including the importance of strong, protective water quality standards and consistent state enforcement of Clean Water Act mandates.

UMW unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner outlined above, and to do so in a manner that contributes to the understanding of the “public-at-large.”

**4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent. 40 C.F.R. § 2.107(l)(2)(iv).**

There is currently little information publicly available regarding EPA R8’s consideration, comments and communication with Montana DEQ concerning the state’s draft numeric nutrient criteria and related variance rule. Absent disclosure of the requested records, the public’s understanding will be shaped only by what is disclosed by the Montana DEQ which, in our opinion, has been historically compromised in providing intelligible, transparent rationales for its decisionmaking implementing mandates of the federal Clean Water Act. The records requested will contribute to public understanding of their government’s role, or their “operations and activities” associated with decisionmaking and implementation of new numeric water quality standards for nutrients and the potential use of related variances from said standards. After disclosure of these records, the public’s understanding of this project will be significantly enhanced. The requirement that disclosure must contribute “significantly” to the public understanding is therefore met.

**5. Whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i).**

UMW has no commercial interest in the requested records. Nor does UMW have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The requested records will be used for the furtherance of the UMW’s educational mission to inform the public on matters of vital importance to the ecological and aesthetic quality of Southwest and West-Central Montana’s Upper Missouri River Basin.

**6. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(3)(ii).**

When a commercial interest is found to exist and that interest would be furthered by the requested disclosure, an agency must assess the magnitude of such interest in order to compare it to the “public interest” in disclosure. If no commercial interest exists, an assessment of that non-existent interest is not required.

As noted above, UMW has no commercial interest in the requested records. Disclosure of this information is not “primarily” in UMW’s commercial interest. On the other hand, it is clear that the disclosure of the information requested is in the public interest. It will contribute significantly to public understanding of EPA R8 decisions concerning water quality protection in Montana. Because the public will be the primary beneficiary of this requested information, please waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4).

## **CONCLUSION**

Please contact me via the information in the signature block below if additional information is necessary. UMW requests that all communications not electronic in nature in response to this request be sent to its advocacy center in Montana, at 24 S. Wilson Ave, Ste 6-7, Bozeman MT 59715.

Thank you for your consideration and prompt response to this request.

Sincerely,

/s/ Guy Alsentzer, Esq.

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